No. 95-1441

(12)

Supreme Court, U.S.
FILED
SEP 25 1996
CLERK

In The

Supreme Court of the United States

October Term, 1996

LINDA J. BLESSING, Director, Arizona Department of Economic Security, in her official capacity,

Petitioner,

v.

CATHY FREESTONE, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S RESPONSE IN OPPOSITION TO RESPONDENTS' MOTION TO CONSIDER REMANDING THIS CASE OR DISMISSING CERTIORARI AS IMPROVIDENTLY GRANTED

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20 pp

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INTRODUCTION

In proposing that this Court take the extraordinary steps of removing this case from the docket and remanding it ("GVR") to the Ninth Circuit for further consideration in light of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105-2355 ("Reconciliation Act"), Respondents make two concessions fatal to their Motion. First, by admitting that the Reconciliation Act "retain[s] the fundamental structure" of Title IV-D, Mot. at 1, Respondents essentially concede that there is no controlling "intervening development" that would justify a GVR order. Indeed, Congress has not altered the core provisions of Title IV-D that form the basis of Petitioner's argument that Respondents cannot sue privately to enforce Title IV-D. Second, Respondents openly concede that the Reconciliation Act will have *no effect* on the Ninth Circuit's decision to create a right that Respondents can enforce under 42 U.S.C. § 1983. Mot. at 9. Thus, a remand to that court would serve no purpose except to generate considerable cost and delay and to continue the doctrinal confusion that caused the Court to grant the Petition in the first place.

In addition to Respondents' concessions, the Reconciliation Act has no bearing on the broad issues that this case raises: (1) whether a federal court can authorize a private right of action against State officials to enforce aspects of federal-state Title IV-D program agreements when Congress has *never* explicitly or implicitly provided such a right; (2) whether the Eleventh Amendment bars Respondents' action; and (3) whether Respondents' suit, which seeks relief for a State's alleged violation of Spending Clause legislation, is beyond the proper scope of § 1983 as a matter of law. Dismissal of the writ would leave these important statutory and constitutional questions unresolved. The costs to the States and to the principles of federalism and separation of powers are too great to sweep this case under the rug by returning it to the Ninth Circuit.

In short, nothing has happened to suggest that the Court granted the Petition for Certiorari improvidently or that

remanding the case would ultimately change the issues or analyses presented to this Court. Accordingly, Respondents' Motion should be denied. In fact, if Respondents are correct that the Reconciliation Act materially changed the landscape surrounding Title IV-D, then Respondents' Complaint, which seeks prospective relief only, is no longer justiciable and the only proper course of action is to vacate the court of appeals' judgment and dismiss the Complaint. *See United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

ARGUMENT

NEITHER THE FACTS NOR THE LAW JUSTIFIES DISMISSAL OF CERTIORARI OR AN IMMEDIATE REMAND.

A. A Remand to the Court of Appeals Would Serve No Purpose Except to Delay and Add Further Costs.

Dismissing the writ of certiorari after Petitioner has filed her merits brief is an extraordinary action that this Court should not undertake lightly. *See Rice v. Sioux City Mem. Park Cemetery*, 349 U.S. 70, 80 (1955) (Black, J., dissenting) (dismissal should be used only in "very unusual circumstances"). As this Court stated just last Term,

> Where *intervening developments*, or recent developments that we have reason to believe the court below did not fully consider, reveal a *reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration*, and *where it appears that such a redetermination may determine the ultimate outcome of the litigation*, a GVR order is, we believe, *potentially* appropriate. Whether a GVR is ultimately appropriate *depends further on the equities of the case*: if it appears that . . . the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.

Lawrence on Behalf of Lawrence v. Chater, 116 S. Ct. 604, 607 (1996) (per curiam) (emphases added). *See id.* at 609 ("GVR power should be exercised sparingly"). Respondents' suggested intervening development – enactment of the Reconciliation Act – and the facts of this case fail to satisfy this Court's standards for GVR.

1. The Reconciliation Act is not a controlling "intervening development."

Respondents' attempts to divert the Court's attention to the Reconciliation Act's immaterial changes and away from the core issues in dispute amount to little more than a shell game. This Court should not allow Respondents to misdirect its attention to the irrelevant "basic structural changes in Part IV-*A* of the Social Security Act" (Mot. at 1), the "eighty-eight pages of amendments to Part IV-*A*" (*id.* at 8 n.6), and the copy of the House Conference Report to Accompany H.R. 3734 that Respondents lodged with the Court.

To be sure, the Reconciliation Act – commonly known as the "Welfare Reform Act" – contains massive changes to the entire federal *welfare* system, including the Food Stamp program, the Child Care program, and the Supplemental Security Income program. This case, however, does not concern those welfare programs. Rather, this case

> is an action for declaratory and injunctive relief alleging that administration of the Arizona state program for collection of child support and provision of various related services required by *Title IV-D of the Social Security Act*, 42 U.S.C. § 651 *et seq.*, violates federal law and regulations enforceable by the plaintiffs . . . in an action brought pursuant to 42 U.S.C. § 1983.

J.A. at 5-6 (emphasis added). Thus, the Court's focus should be on Title IV-D, not on provisions of other, irrelevant programs.

Even Respondents concede, as they must, that the Reconciliation Act retains the "fundamental structure" of Title IV-D. Mot. at 1. The Reconciliation Act simply builds upon Title

IV-D's existing framework; it does not alter Title IV-D's core scheme. Moreover, the enhancements that it adds to Title IV-D have *no substantive effect* upon the proper outcome of this case.[1] As before, the core services that participating States provide include: attempting to locate absent parents (42 U.S.C. §§ 652(a)(1), 654(8), 654(9)(B)); attempting to establish paternity (42 U.S.C. §§ 654(4)(A), 654(6)); establishing child (and medical) support orders (42 U.S.C. §§ 654(4), 654(6), 652(f)); modifying support orders (42 U.S.C. § 666(a)(10)); and enforcing support orders (42 U.S.C. §§ 654(9), 654(20)). The Reconciliation Act also leaves intact Title IV-D's requirement that the Secretary of Health & Human Services ("Secretary") conduct a complete program audit of a State's Title IV-D program at least triennially and an annual audit if the program fails substantially to comply with Title IV-D's standards. 42 U.S.C. § 652(a)(4). Congress did not alter this case by passing the Reconciliation Act.[2] *See* Appendix A.

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[1] For example, the Reconciliation Act nationalizes the successful enforcement programs that Arizona and other States have developed on an experimental basis by adding program enhancements such as (1) suspension and revocation of professional, occupational, and drivers licenses (Reconciliation Act § 369, 110 Stat. 2251 (to be codified as 42 U.S.C. § 666(a)(16)); Arizona has had such programs for years (professional licenses – 1990; drivers licenses – 1995) (*see* Arizona Revised Statutes ("A.R.S.") §§ 25-320.01, 25-502 , 25-517); (2) new hire reporting (Reconciliation Act § 313(b), 110 Stat. 2209 (to become § 653A)); Arizona provided leadership in developing this program in 1994 (A.R.S. § 23-722.01); and (3) centralized payment processing for Title IV-D cases (Reconciliation Act § 312(b), 110 Stat. 2207 (to become § 654B)); Arizona again played a leadership role (A.R.S. § 46-441). The addition of these and other enhancements to Title IV-D does not alter this case in the slightest.

[2] The cases that Respondents cite in support of GVR are inapposite. For example, after this Court granted certiorari in *Morris v. Weinberger*, 410 U.S. 422 (1973) (per curiam), Congress completely *repealed* the section of the Social Security Act that had been held to bar the Plaintiff's claim. The issue in *Woods v. Durr*, 336 U.S. 941 (1949) (per curiam), was whether section 209(a) of the Housing and Rent Act of 1947, as amended by the Housing and Rent Act of 1948, prohibited plaintiff's eviction. *See Woods v. Durr*, 170 F.2d 976 (3d Cir. 1948). After the Court granted

2. There is no "reasonable probability" that the Ninth Circuit would reverse itself if a remand occurs.

Respondents have not shown that the suggested intervening event here – passage of the Reconciliation Act – would affect the decision below on remand. To the contrary, Respondents openly concede that the Reconciliation Act will *not* change the result the court of appeals reached, and they assert that the Ninth Circuit's decision "is *all the more correct* in light of the recent amendments." Mot. at 9 (emphasis added). It is, therefore, difficult to imagine what legitimate purpose Respondents believe a remand would serve at this juncture.

3. The equities of the case counsel against a remand at this stage.

A remand order not only would inflict delay and additional costs upon Petitioner and the State of Arizona, but also would harm other Title IV-D beneficiaries – children and their custodial parents – because every dollar and minute that Petitioner and her agency spend responding to this lawsuit comes from the same pool of resources that the State uses to provide Title IV-D services. *See* Pet. Br. at 2. Thus, the monetary and human costs inherent in a remand clearly outweigh whatever speculative benefit, if any, that a remand would engender.[3]

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certiorari, Congress again amended the section and the Housing Expediter promulgated entirely new regulations pursuant to the amendment. Both of these cases dealt with changes in specific statutory provisions whose language would control the Court's resolution of the issue presented. Congress has not effected any similar change in this case.

[3] As set forth in the *amici curiae* briefs filed by 46 States and Territories, the Council of State Governments, the National Conference of State Legislatures, the National Governors Association, and others, those additional costs will be borne by many others beyond just the Petitioner, Respondents, and the Arizona children and custodial parents.

B. This Court Did Not Grant the Petition Improvidently in Light of the Serious Statutory and Constitutional Issues That the Petition Poses.

Nothing in the Reconciliation Act resolves the statutory and constitutional issues that Petitioner presented and discussed in her opening brief.

1. The Reconciliation Act does not alter the statutory analysis of the relevant provisions of Title IV-D.

Petitioner argued in her opening brief that, under the test established in *Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498 (1990), and *Suter v. Artist M.*, 503 U.S. 347 (1992), Title IV-D does not create rights that Respondents can enforce under § 1983. *See* Pet. Br. at 12-19. The Reconciliation Act does nothing to change this conclusion. First, the Reconciliation Act does not cure Title IV-D's failure to create an express private cause of action in Respondents' favor. As Petitioner explained in detail (Pet. Br. at 6-7, 16), this Court has insisted that Congress impose all conditions upon Spending Clause grants "unambiguously" and with a "clear voice." Respondents do not even attempt to claim that the Reconciliation Act adds the requisite level of clarity. Thus, any attempt by federal courts to create a private cause of action against State officials still implicates the same federalism and separation-of-powers concerns that Petitioner raised.

Second, Petitioner argued that, under the Court's existing precedents, no § 1983 cause of action is available unless the underlying statute provides a clear right – a guarantee that each affected individual will receive certain benefits. Pet. Br. at 13. The Ninth Circuit rejected that argument, and Title IV-D still does not guarantee any individual recoveries. Thus, the issue presented remains completely unaffected by the changed statute, and the question still warrants resolution by this Court

to provide lower courts with guidance in deciding which federal laws are enforceable under § 1983.[4]

Third, the Reconciliation Act does not add any provisions to Title IV-D that make the States the guarantors of child support enforcement and paternity establishment. The real cause of Respondents' injuries – failure to receive support – remains the absent parent, not the State. Thus, it also remains true that no individual Respondent can establish the causation or redressability elements of Article III standing, much less any statutory "right." *See* Pet. Br. at 16-19.

Fourth, notwithstanding Respondents' assertions to the contrary (Mot. at 1a, 2a), the statutory test for State conformity with Title IV-D remains "*substantial* compliance" – not "complete," "full," or "total" compliance. *See* Reconciliation Act, 110 Stat. 2145. Thus, it is true – as it always has been – that Title IV-D does not guarantee that States will collect child support payments for every applicant in every case every time.

Fifth, the Reconciliation Act does not alter Congress's carrot-and-stick approach for encouraging compliance by participating States. The Reconciliation Act retains incentive payments to reward States that perform their services efficiently and expeditiously. *Compare* 42 U.S.C. § 658 *with* Reconciliation Act § 341(a), 110 Stat. 2231. As before, the Secretary must conduct a program audit at least triennially. In the event that the Secretary's audit determines that a State's Title IV-D program is not in substantial compliance, the penalties that can be assessed remain the same. *Compare* 42

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[4] If this Court rejects Petitioner's basic position and the holdings upon which Petitioner relied and instead adopts a standard that is less categorical than the one that she proposes, it might be appropriate for the Court to remand then to allow the Ninth Circuit to apply this Court's analysis to the specific requirements of Title IV-D. This approach would fully satisfy the concerns that Justice Scalia expressed in *Stutson v. United States*, 116 S. Ct. 611, 613-614 (1996), which Respondents cite (Mot. at 3). But a remand without guidance from this Court will be a useless exercise, as Respondents concede, and thus will undermine the efficiency that the summary process of vacating and remanding is designed to further.

U.S.C. § 652(a)(4) *with* Reconciliation Act, 110 Stat. 2146. Plus, Congress retained the Secretary, not private individuals such as Respondents, as the person responsible for ensuring compliance with Title IV-D. *See* Pet. Br. at 20-23. Moreover, it is the *existence* of the incentives and penalties, rather than their specific formulas, that Petitioner relies upon to support her argument that Title IV-D does not create enforceable rights in Respondents by imposing binding obligations on participating States.[5]

Finally, the Reconciliation Act does not substantially alter the administrative enforcement scheme that Congress designed. Congress chose the precise remedies it felt were appropriate; private suits by individuals such as Respondents were not among the remedies that Congress authorized. *See* Pet. Br. at 20-23.

2. The Reconciliation Act does not affect Petitioner's argument that the Eleventh Amendment bars Respondents' suit.

Respondents do not even attempt to argue that the Reconciliation Act affects Petitioner's Eleventh Amendment arguments.[6] The Reconciliation Act does not purport to abrogate

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[5] Although the Reconciliation Act does make some changes to the audit and penalty scheme (such as making more effective use of automation and focusing on performance indicators, *see* Mot. at 4a-6a), these changes would not affect the Ninth Circuit's decision given the majority's conclusion that any such scheme is insufficient to establish congressional intent to preclude a private cause of action. Pet. App. at 25a-26a.

[6] Respondents do suggest, however, that Petitioner's Eleventh Amendment arguments somehow provide an additional basis for dismissal or remand. Mot. at 3 n.2. Their suggestion is without merit. First, although it is true that this Court did not issue its decision in *Seminole Tribe v. Florida*, 116 S. Ct. 1114 (1996), until after the Ninth Circuit issued its decision in this case and Petitioner had filed her Petition for Certiorari, Petitioner specifically mentioned *Seminole Tribe* in her Reply in Support of Petition for Certiorari (Apr. 15, 1996). Thus, Respondents' contention that

participating States' sovereign immunity. Moreover, the Reconciliation Act continues to require actions from and impose obligations on participating "States" and their "state agencies," not upon State officers such as the State Director, thus reinforcing that Congress did not intend to create an *Ex parte Young* cause of action under the Title IV-D. *See* Pet. Br. at 28-29.[7] Respondents' Motion demonstrates the importance of this distinction by making it plain that Respondents are not looking only to the State Director for relief. *See, e.g.*, Mot. at 4-5 ("class action complaint alleging that the *state of Arizona* . . . was failing on a systematic basis to provide the child support services required by Part IV-D") (emphasis added).

Petitioner failed to give this Court the "opportunity to consider when it acted on the petition whether the case should be GVR'd" (Mot. at 3 n.2) is inaccurate. Second, as Respondents concede, even if the Petition had not raised the Eleventh Amendment argument, this Court is free to "consider Eleventh Amendment issues raised for the first time in this Court. *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945)." Mot. at 4 n.2. Third, for the Court to remand this case for the Ninth Circuit to apply *Seminole Tribe* would be a waste of time, because the Ninth Circuit majority already revealed its lack of concern for State sovereignty when it justified its holding on the theory that "the contempt power of the court, as well as other traditional equitable remedies, is likely to be more successful in inducing compliance on the part of state officials, and where necessary, *state legislators*." Pet. App. at 29a (emphasis added).

[7] *See, e.g.*, Reconciliation Act § 301(a)(1), 110 Stat. 2199 ("the *State* will"), § 342(b), 110 Stat. 2233 ("by the *State agency*"), and § 314(a)(F), 110 Stat. 2214 ("the *agency* administering the State plan")(emphases added). The *only* exception appears in the Reconciliation Act at § 353, 110 Stat. 2240, which establishes personal liability for "State officers and employees" who improperly release private financial information. Of course, Respondents' Complaint does not allege any violation of this new provision.

3. The Reconciliation Act has no effect on Petitioner's argument that Respondents' suit is beyond the proper scope of § 1983.

Petitioner has asked this Court to limit the holding of *Maine v. Thiboutot*, 448 U.S. 1 (1980), to those substantive statutes that create an express cause of action or to those enacted pursuant to Congress's power under the Fourteenth Amendment. *See* Pet. Br. at 30-49. The Reconciliation Act does nothing to alter the propriety of such a limitation. First, the Reconciliation Act did not purport to amend § 1983, and Respondents do not argue otherwise. Second, even after the Reconciliation Act amendments, Title IV-D remains Spending Clause legislation, not legislation enacted pursuant to Congress's power under the Fourteenth Amendment. Thus, certiorari remains appropriate to resolve this important question regarding the proper scope of § 1983.

Petitioner's opening brief demonstrates the crying need for this Court to realign the relationship between Congress and the courts in determining when a State is amenable to suit for alleged violations of federal law under § 1983. Where Congress has not expressly exposed States to private actions as a condition of receiving federal moneys, courts have inconsistently granted private rights in some cases and denied them in others. Ironically, the recent amendments to Title IV-D merely reflect this same core problem – while Congress remained mute on the essential question of the availability of a private cause of action, its nonaction will be more than sufficient to lead the Ninth Circuit to hold that Respondents can sue the State. Instead of supporting vacatur or dismissal, Congress's silence on the issue presented here reinforces the national importance of having the Court decide this case.

C. In the Face of a Controlling Intervening Event, the Proper Course of Action Is to Dismiss the Complaint, Not the Writ.

If Respondents are correct that the Reconciliation Act creates a "statutory scheme in many critical respects very different from the one previously canvassed in this case,"

Mot. at 8, then this Court's proper course of action is not to dismiss the writ or vacate and remand to the Ninth Circuit, but rather to vacate the decision below and remand with instructions to dismiss the Complaint as moot or no longer ripe.

Respondents' main thesis is that the Reconciliation Act worked such a substantial change to Title IV-D that this Court cannot proceed. If this is true, the logical conclusion is that this Court should order dismissal of the Complaint, not the writ of certiorari. Both parties agree that the Complaint seeks "only prospective relief" to force the State to comply with Title IV-D requirements. *Id.* Both parties further agree that "the relevant statutory provisions are the ones in effect when the case is decided [by this Court], not those in effect when the complaint was filed." *Id.* But Arizona cannot be found to be *out* of compliance when the Reconciliation Act's statutory provisions have not yet become effective and when, as Respondents concede, the Secretary – the person charged with the responsibility of enforcing Title IV-D – has not had "any opportunity to consider" and analyze the Reconciliation Act or to promulgate interpretive regulations. Mot. at 9.

The absence of regulations is significant. For example, the Reconciliation Act gives the Secretary two years in which to develop regulations concerning automated data processing and information retrieval systems. Reconciliation Act § 344(a)(3), 110 Stat. 2236. Until these regulations are in place, States do not know exactly what information they must capture or in what format. This undefined situation is significant because under the Reconciliation Act audits will be conducted initially based on the automated reports that States generate. *Id.*, § 342(a)(3), 110 Stat. 2233. Thus, it is impossible for a federal court to find a State to be "out of compliance" with new laws that may not become effective for another two years and when the compliance measurement has not yet been developed.

If Respondents are correct that the Reconciliation Act materially changed the landscape of child support enforcement, then their Complaint has become moot and is no longer ripe. Any allegation of past violation and injury is moot

because, according to Respondents, the law that this Court must apply has subsequently changed dramatically. Any demand for future compliance is no longer ripe because Arizona has not had the chance to "prove itself" under the new law, let alone been found to be "out of compliance" with its relevant requirements.

If this Court's review has been "prevented through happenstance" by Congress's enactment of the Reconciliation Act, "the established practice of the Court in dealing with a civil case from a court in the federal system which has become moot . . . pending [its] decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss" the Complaint. *Munsingwear,* 340 U.S. at 39-40. *See also U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 115 S. Ct. 386, 391 n.3 (1994) (Court "stand[s] by *Munsingwear's* dictum that mootness by happenstance provides sufficient reason to vacate").

CONCLUSION

This Court should deny Respondents' Motion. Alternatively, if the Court finds that summary disposition is appropriate at all, it should vacate the Ninth Circuit's decision and remand with directions to dismiss the Complaint.

Respectfully submitted,

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APPENDIX A

Respondents' Motion attaches an Appendix supposedly highlighting the "Pertinent Changes Made by the [Reconciliation Act]." Contrary to Respondents' contentions that the Reconciliation Act changed Title IV-D so materially that this Court cannot decide this case, the Reconciliation Act actually retains the requirements that Respondents questioned. A comparison of their allegations with the facts dispels their contention about "material" changes:

Respondents' Contentions	The Facts
The Reconciliation Act "eliminates" the requirement in 42 U.S.C. § 602(a)(27) that a State must "operate[ ] a child support program in substantial compliance with such a plan." Mot. App. at 1; *see also id.* at 2 (the Reconciliation Act "does not contain the 'substantial compliance' language of the analogous section in the prior statute, 42 U.S.C. § 602(a)(27)").	A State's IV-D program still must "substantially comply" with the requirements of Title IV-D. *See* Act, 110 Stat. 2145.
"The audit and penalty provisions limiting Parts IV-A and IV-D have been changed" (*id.* at 3), including "the exclusion of any cross-reference to the pertinent penalty provisions of Part IV-A." *Id.* at 6.	A program audit still must be conducted no less than once every three years. In the event the Secretary's audit determines that a State's IV-D program is not substantially complying, the penalties that can be

assessed remain the same: they are assessed against the Title IV-A program and using the same sliding scale that existed before: 1-2%, 2-3%, 3-5%. *See* Act, 110 Stat. 2146.

"The original welfare reform bill introduced in the 104th Congress had continued . . . statements" about individual recipients of Title IV-D services not being entitled to such services, citing H.R.4, § 302, 104th Cong. 1st Sess. (January 4, 1995). Mot. App. at 2-3.

Respondents' observation is meritless. First, the language that Respondents cite came from a completely different bill (H.R.4, which was never signed into law) rather than to the bill Congress ultimately enacted, H.R. 3734 (the Reconciliation Act). Second, a committee deleted that provision without comment before the entire Congress could consider and take action on the provision, thus rendering it meaningless. *See e.g., Trainmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947) ("interpretation of statutes cannot be made to rest upon mute intermediate legislative maneuvers"). Third, the "pointed failure" rests with Respondents for not convincing Congress to add language in Title IV-D showing "unambiguously" that Congress intended that States would bear § 1983 liability.

In Title IV-D, (before the Reconciliation Act), "[s]ubstantial compliance was defined as full compliance . . . ." Mot. at 3a.

Not true. Title IV-D, both pre-and post-Reconciliation Act, leaves it up to the Secretary of Health & Human Services to define the term "substantial compliance." Compare 42 U.S.C. § 654(13) with Reconciliation Act 316(g)(1)(B), 110 Stat. 2218 (to be codified at 42 U.S.C. § 654(13). To date, the Secretary has chosen to define it at a 75% rate, not "full" (as in 100%), as Respondents suggest.

The "$50 'pass through' payment is eliminated in the Reconciliation Act." Mot. at 9a.

True, but insignificant. Before the Act, States had to pass through to the custodial Title IV-A parent the first $50 received each month in child support payments (while retaining the rest to reimburse the State and federal government for the costs of the child support program). The Act's elimination of this requirement (allowing the governments to retain all child support payments for Title IV-A recipients) does not affect the Ninth Circuit's decision, which did not rely upon this provision, – and indeed, barely mentioned it because it applied to the claim of only one of the five Respondents. *See* Pet. App. at 3a, 5a-7a, 30a-31a.